



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2004

Mr. David H. Brown
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760

OR2004-3641

Dear Mr. Brown:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200859.

The Port of Houston Authority (the "authority"), which you represent, received a request for the authority's truck interchange information, including 18 specified categories of information, for the Barbours Cut public terminal for 2003 and 2004.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You also believe that this request for information implicates the proprietary interests of third parties under section 552.110. You notified 219 third parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.² You also submitted a representative sample of the requested information.³ We have reviewed the submitted

¹ You inform us that the requestor subsequently confirmed that his request is for information relating to the Barbours Cut terminal. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

² See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

³ This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the authority to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

information and have considered your arguments and those that we received from many of the interested third parties.

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You inform us that the authority is the governmental entity that owns and operates the public facilities of the Port of Houston (the "port"). You also inform us that the port currently ranks as the dominant container cargo port in the Gulf of Mexico and that container cargo is a critical element of the port's operations. You also explain that the authority faces significant competition for container cargo from other major seaports on the Gulf, Atlantic, and Pacific coasts and from private terminal operators in the state of Texas. You explain that the requested information is obtained from every carrier entering an authority terminal to pick up or deliver cargo. You state that the requested information provides an exhaustive list of the authority's customers (shipping lines) and their transfer agents (trucking companies). You also state that this information reveals,

comprehensively and in minutest detail, the [authority's] core business operations: the number of containers moving through the [authority's] terminals, the contents of the containers, the provenance and destination of the containers, and how hazardous materials are handled by and moved to and from the [authority].

You argue that release of the requested customer information would allow competing ports and private facilities to systematically target the authority's customers and attempt to undermine its established business relationships. You also argue that the requested information, in its entirety, would serve as a valuable marketing tool that would enable the authority's competitors to adapt their facilities and operations to be more attractive to the authority's clients. Having considered your arguments and reviewed the affidavits you submitted, we conclude that you have demonstrated that the requested information is

excepted from disclosure in its entirety under section 552.104. As we are able to make this determination, we need not address your other arguments, or those of the third parties, under sections 552.101 and 552.110.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

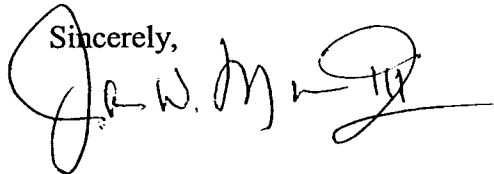
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 200859

Enc: Submitted documents

c: Mr. Tim McGarity
IM-Intel
P.O. Box 148
La Porte, Texas 77572
(w/o enclosures)

All Third parties
(w/o enclosures)